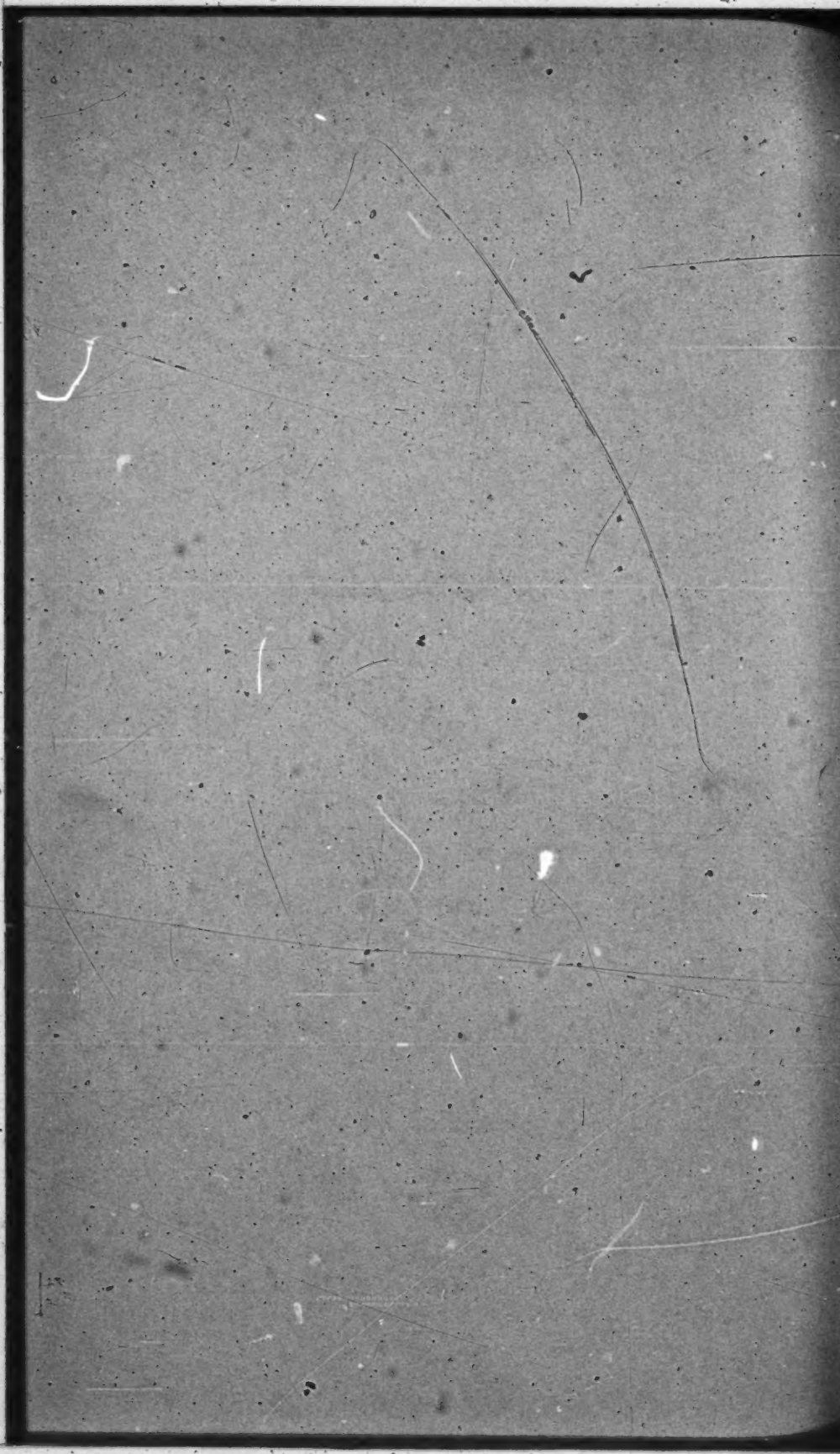

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CHARLES ELMORE CR
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 193.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

vs.

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Appeal from the District Court of the United States for the Western District of Arkansas.

APPELLANT'S STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT.

THOS. B. PRYOR,
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Appeal from the District Court of the United States for the Western District of Arkansas.

APPELLANT'S STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

The appeal in this case is prosecuted from an order, dated April 26, 1930, of a three-judge court of the United States for the Western District of Arkansas, organized as provided by the Federal Code, dismissing the appellant's

(plaintiff's) bill and refusing to restrain the defendants, the Attorney-General and Prosecuting Attorneys of the State of Arkansas, from enforcing what are known as the Arkansas Extra Brakeman and Extra Switchman Laws (Laws of Arkansas 1907, No. 116, and Act of February 20, 1913; Sections 8577, 8586, Crawford & Moses' Digest of the Statutes of Arkansas for 1921). The appeal was allowed by said three-judge court on May 13, 1930, and a transcript of the record deposited with the Clerk of the Supreme Court on June 9, 1930 (Tr. Rec., pp. 107, 113).

The appellant, in its petition, alleged that the above laws of the State of Arkansas were in contravention of the Constitution of the United States and that the order and decree appealed from upheld the constitutionality of said laws. The appellant also alleged in its petition that said laws of the State of Arkansas were inconsistent with and in violation of the general object of the Act to Regulate Commerce, and argued that said laws were opposed to Section 1 of the Act of Regulate Commerce, as amended by the Transportation Act of 1920, and were inconsistent with Sections 13, 15 and 15a of the Interstate Commerce Act, as amended by the Transportation Act of 1920; also that said acts of the General Assembly of the State of Arkansas were inconsistent with the spirit and intent of the Federal Railroad Labor Act of 1926 and the Commerce Clause of the Constitution of the United States (Section 8, Article I of said Constitution). And appellant presents to the Court that the judgment appealed from is a final judgment dis-

missing the plaintiff's bill, and the appeal presents a federal question and involves the construction of the Act to Regulate Commerce, and said appeal was timely granted and this Court has jurisdiction over both the subject matter of said cause and the parties thereto. And appellant relies upon the decisions of this Court, cited in its statement of the grounds on which it relied, as a basis of this Court's jurisdiction in accordance with paragraph 1 of rule 12 (Tr. Rec., pp. 130, 135).

STATEMENT.

This is an appeal from an order by a three-judge court of the United States for the Western District of Arkansas, sustaining a motion to dismiss the appellant's petition, which, with affidavits sustaining the allegations of the bill, sought to restrain the enforcement of the Arkansas Extra Brakeman and Extra Switchman Laws (Laws of Arkansas, 1907, No. 116, and Act of February 20, 1913; Sections 8577-8586, Crawford & Moses' Digest of the Statutes of Arkansas for 1921). These statutes provide that no railroad operating in the State of Arkansas, engaged in the transportation of freight, shall equip any of its freight trains of 25 cars or more with a crew consisting of less than an engineer, a fireman, a conductor, and three brakemen, "regardless of any modern equipment of automatic couplers and air brakes" (Tr. Rec., p. 4). The act does not apply to railroads less than fifty miles in length, and the statute provides a penalty of not less than one hundred dollars nor more than five hundred dollars for each offense (Tr. Rec., p. 5).

What is known as the Arkansas Extra Switchman Law provides that no railroad operating yards or terminals in cities of the first and second class in the State of Arkansas, where "switching, pushing or transferring of cars are made across public crossings within the city limits," shall operate switch engines without a crew consisting of an engineer, a fireman, a foreman, and three helpers (Tr.

Rec., pp. 5, 6). A penalty of fifty dollars for each offense is provided for by this act (Tr. Rec., p. 6).

The constitutionality of these statutes was upheld by this Court as valid police regulations, in the absence of action by Congress prior to the enactment of the Transportation Act of 1920.

Chicago, Rock Island & Pacific Ry. Co. v. Arkansas, 219 U. S. 453;

St. Louis, Iron Mountain & Southern Ry. Co. v. Arkansas, 240 U. S. 518.

These decisions were before Congress empowered the Interstate Commerce Commission to regulate "the supply of trains" and they did not go to the extent of holding that these laws were necessary safety measures, but the effect of the decisions was that they came within the police power of the state, in the absence of legislation by Congress. The petition and the fourteen affidavits filed by the appellant to sustain the allegations of the petition established the fact that these laws in no way contributed to the safety of either freight-train or switch-engine operations; that a freight train of only twenty-five cars was rarely seen at the present day on any of the main trunk line roads (Tr. Rec., pp. 6, 32, 36, 40). The petition and affiadvits also alleged the fact that the standard freight and switching crew upon all the railroads in the United States consists of one less brakeman and one less switchman than were required by the Arkansas laws (Tr. Rec., pp. 6, 45, 47, 48).

The petition and affidavits filed by the appellant also showed the tremendous burden upon interstate commerce resulting from the Arkansas laws complained of, in that a compliance with the provisions of these laws cost the appellant an average of $600,000.00 per year, and the railroads of Arkansas, as a whole, in the neighborhood of a million dollars per year, all of which was unnecessary for "either efficient or safe operation" (Tr. Rec., pp. 9, 46, 47, 81, 83, 85).

The petition and affidavits set forth the improvements made upon the property of the appellant in Arkansas since the enactment of these statutes, the appellant having adopted block signals throughout the State of Arkansas, heavier rails, heavier locomotives, increased ballast, and important changes in roadway and equipment, all of which were safety measures adopted for the safety of operation of both switch engines and freight trains (Tr. Rec., pp. 33, 34, 35, 39, 43, 71, 72, 73, 74, 75, 77, 78).

The affidavits filed with the petition also affirmed that maintenance expenses had been reduced upon the appellant's railroad in the State of Arkansas by making the roadway more durable with heavier rails, anti-creepers, larger ties, deeper and heavier ballast, bridges of stronger construction, stronger and more durable freight cars of steel construction, which had displaced the wooden cars of small capacity, and larger engines equipped with safety devices and freight cars equipped with air valves regulated from the engine—all of which made for the safety

and efficiency of freight-train operation in the State of Arkansas (Tr. Rec., pp. 72, 73, 74, 75, 77, 78).

It was also alleged that grades had been reduced and new rules of safety adopted for the old rules, the mechanical transmission of power upon engines had been greatly increased and the cylinder and tractive power had been adapted to the transmission of any kind of power in any desired ratio of speed by a mere variation of proportions (Tr. Rec., pp. 44, 72, 73, 74, 75, 77).

By reason of the foreging facts, affirmed by the fourteen affidavits filed with the appellant's petition, the petition alleged that these statutes were unconstitutional and void because:

(1) Said laws invaded the field of regulation delegated by Congress exclusively to the Interstate Commerce Commission as the administrative agency of the Federal Government in 1920.

(2) Said laws would defeat the purposes of the comprehensive federal scheme of regulation prescribed in the Transportation Act of 1920.

(3) By said legislation Congress occupied the field and the state authority had been excluded thereby.

(4) Said state statutes constituted a direct regulation of interstate commerce and imposed an undue and unreasonable burden upon interstate commerce.

(5) Said laws were unreasonable and arbitrary acts in violation of the Fourteenth Amendment to the Constitution of the United States.

(6) The damage and injury sustained by the appellant by reason of said laws were great and irreparable, and no way is provided for testing their validity, except through prosecutions for the penalties provided by the laws.

The defendants moved to dismiss the plaintiff's bill for the following reasons: Because the action of the plaintiff was in contravention of the Eleventh Amendment of the Constitution of the United States, and that it was a suit against the state; that plaintiff had a complete remedy under the laws of the state; that Congress had not specifically authorized the Interstate Commerce Commission to designate the number of railroad employes that should constitute a train or switching crew; that the Interstate Commerce Commission had adopted no rule upon this subject; that Congress had not occupied the field covered by the state legislation; that from the number of years the laws had been in effect it did not appear that they would cause the plaintiff any immediate or irreparable injury; that the legislation was within the reserved powers of the state and that the opinions of this Court constituted a final adjudication as to the validity of said laws (Tr. Rec., pp. 17-18-19).

Although the substantial allegations of the appellant's petition were admitted by the motion to dismiss, which was taken under advisement by the three-judge Court, along with the defendants' answer and their one affidavit denying the material allegations of the appellant's peti-

tion, the Court, after considering the petition and the affidavits, apparently overlooked the fact that the defendants' motion to dismiss admitted the facts alleged; but after taking the case under advisement, upon the appellant's petition and affidavits and the defendants' motion to dismiss, and single affidavit filed, entered an order dismissing the bill, from which the appellant prosecuted its appeal (Tr. Rec., pp. 130, 113).

ASSIGNMENT OF ERRORS.

Appellant assigns for error the action of the three-judge court in this cause in the following particulars:

I.

In refusing the temporary injunction and restraining order prayed for by the appellant, enjoining the Arkansas Full Train Crew Law and the Full Switching Crew Law (Sections 8577, 8586, Crawford & Moses' Digest, Statutes of Arkansas for 1921), which statutes attempted to govern the operation and length of freight trains used in interstate commerce, because said statutes were clearly inconsistent with the entire comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act, as amended by the Transportation Act of 1920.

II.

In holding that said Full Train Crew and Full Switching Crew Laws of the State of Arkansas were not inconsistent with and in violation of paragraphs 10 and 21 of Section 1 of the Act to Regulate Commerce, as amended by the Transportation Act of 1920, known as the Car Service Sections of the Interstate Commerce Act (Tr. Rec., pp. 121, 122, 127).

III.

In holding that said acts of the General Assembly of the State of Arkansas were not inconsistent with Sections 13,

15 and 15a of the Interstate Commerce Act as amended by the Transportation Act of 1920 (Tr. Rec., pp. 124, 125).

IV.

In holding that said acts of the General Assembly of the State of Arkansas were not inconsistent with the spirit and intent of the Federal Railroad Labor Act of 1926 (Tr. Rec., p. 129).

V.

In holding that the Congress of the United States, by the above statutes, had not occupied the field covered by the Arkansas statutes complained of, and that Congress had not delegated to the Interstate Commerce Commission and the Railroad Labor Board competent and full authority over the subject matter attempted to be covered by the said Arkansas statutes (Tr. Rec., p. 120).

VI.

In holding that it was bound by the decisions of this Court in the case of Chicago, Rock Island & Pacific Ry. Co. v. State of Arkansas, 219 U. S. 453, and St. Louis, Iron Mountain & Southern Ry. Co. v. State of Arkansas, 240 U. S. 518, in view of the subsequent legislation by Congress which was not before this Court and was not considered in the cases above referred to (Tr. Rec., p. 115).

VII.

In holding that Congress had not used "fairly clear language" in the amendments to the Transportation Act above referred to, removing from the states the power to prescribe the length of freight trains used in interstate commerce (Tr. Rec., p. 127).

VIII.

In holding that the congressional legislation above referred to had not "specifically expressed a grant to the Commission of power to control the number of employes to be used by a carrier in the movement of its trains or cars in interstate commerce," when paragraphs 10 and 21 of Section 1 of the Act to Regulate Commerce, as amended by the Transportation Act of 1920, clearly and explicitly delegated to the Interstate Commerce Commission the power to prescribe "safe and adequate car service," which is expressly defined by paragraph 21 of Section 1, and paragraph 10 of Section 1 of the Act to Regulate Commerce, as the right to require and regulate the "safe and adequate supply of trains by any carrier by railroad subject to this act" (Tr. Rec., p. 120).

IX.

In holding that the words "practice" and "practices," as used in the Transportation Act, "are, when given their broadest permissible meaning, confined to such as are

originated by the carrier," when the general scheme and purpose of the Transportation Act were intended to prevent such discriminations against interstate commerce, and such wholesale expenditures as those imposed by these acts of the General Assembly of the State of Arkansas, which are clearly unreasonable and uneconomical, and impose a "practice" in violation of the spirit and intent of the Transportation Act (Tr. Rec., p. 121).

X.

In holding that, by the Transportation Act, Congress had not conferred upon the Interstate Commerce Commission "the power to supervise carrier expenditures—at least to the extent of preventing waste or improvidence," and "to uphold the power in the Interstate Commerce Commission would be a decided step in advance of any congressional action," and that the Interstate Commerce Commission, under the Transportation Act, possessed "no power of directly supervising carrier expenditure," and that the Transportation Act was "clearly aimed only at voluntary expenditures by the carrier," and did not apply to such unreasonable and extravagant expenditures exacted by different states which had a tendency to and did break down the national transportation agencies intended to function as a whole for the benefit of the public (Tr. Rec., p. 128).

XI.

In holding that appellant's petition stated no cause of action, and in refusing the appellant a temporary injunction to prevent the enforcement of the illegal statutes complained of in the appellant's bill, and in dismissing the case at cost of appellant (Tr. Rec., p. 130).

SUMMARY OF ARGUMENT.

A.

The action of the three-judge court in sustaining defendants' motion to dismiss, which admitted all the facts properly alleged, was at variance with the established rule of practice prescribed by this Court in similar cases.

Georgia Power Co. v. Decatur, 281 U. S. 505;
Chicago Junction Case, 264 U. S. 262;
Great Northern R. Co. v. Minnesota, 238 U. S. 34;
Washington v. Fairchild, 224 U. S. 510;
Reagan v. Farmers Loan Co., 154 U. S. 412;
Groesbeck v. Duluth, 250 U. S. 607;
Mississippi v. Mobile & Ohio R. Co., 244 U. S. 388;
Smith v. Texas, 233 U. S. 630;
Banton v. Belt Line, 268 U. S. 413;
Lincoln Gas & Electric Co. v. Lincoln, 250 U. S. 256.

B.

In deciding that Congress had not occupied the field of regulating "the supply of trains," and sustaining the defendants' motion to dismiss, and thus holding that Section 1 of the Act to Regulate Commerce (41 Stat. 456, 475, 476) did not authorize the Interstate Commerce Commission as an administrative body to establish the "practice" regulating "the supply of trains," the conclusion of the Court is directly opposed to that reached by the Interstate Commerce Commission in its interpretation of its powers under the "Car Service Section" of the Act to Regulate Com

merce (In re Train Service on Northern Pacific Case, No. 17,983, 112 I. C. C. 191, decided April 28, 1926), the Commission in this case having directly found:

> "We accordingly find that jurisdiction to regulate the **supply of trains** for the transportation of property has been vested in us."

C.

The decision of the three-judge court in this case that Section 1 of the Act to Regulate Commerce does not vest in the Interstate Commerce Commission the power to regulate "the supply of trains," is directly opposed to the language of the Act to Regulate Commerce and the decisions of this Court construing said act (Paragraphs 3, 10, 11, 13, 14 and 21 of Section 1 of the Act to Regulate Commerce, as amended in 1920).

Train Service on Northern Pacific, 112 I. C. C. 191;
In re Irregularities in Mine Ratings, 25 I. C. C. 286, 293;
Wisconsin Commission v. C. B. & Q. R. Co., 257 U. S. 563;
New England Divisions Case, 261 U. S. 184;
Dayton Goose Creek Case, 263 U. S. 477;
Great Northern R. Co. v. Elevator Co., 259 U. S. 285.

D.

The decision of the Court that Sections 13, 15 and 15a of the Act to Regulate Commerce, as amended by the Transportation Act of 1920, did not vest in the Interstate

Commerce Commission any power to "regulate carrier expenditures," except those that were voluntary upon the part of the carrier, is opposed to the decisions of this Court and the language of the Act to Regulate Commerce.

St. Louis & O'Fallon R. Co. Case, 124 I. C. C. 5;
St. Louis & O'Fallon v. U. S., 279 U. S. 533-34;
Case No. 12,066, Maintenance of Expenditures of Pittsburgh & Lake Erie R. R., 136 I. C. C. 527, 535;
Mitchell Coal & Coke Co. v. Pa. R. R. Co., 230 U. S. 247;
Great Northern R. Co. v. Elevator Co., 259 U. S. 285.

E.

The conclusion of the Court, in sustaining the motion to dismiss appellant's bill, that it was bound by the decisions of this Court in Chicago, Rock Island & Pacific Ry. Co. v. Arkansas, 219 U. S. 453, and St. Louis, Iron Mountain & Southern Ry. Co. v. Arkansas, 240 U. S. 518, was a misinterpretation of those decisions, since the opinions in those cases expressly stated that the Arkansas laws were valid in the absence of action by Congress, and the three-judge court failed to follow later decisions of this Court and the decisions of the Interstate Commerce Commission in holding that Section 1 of the Act to Regulate Commerce vested in the Interstate Commerce Commission the power to regulate "the supply of trains."

In re Train Service on Northern Pacific, Case No. 17,983, 112 I. C. C. 191, decided April 28, 1926;

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F.

The three-judge court failed to appreciate the allegations of the petition and affidavits regarding the improvements made in the roadbed, track, equipment and management of the appellant's railroad since these laws were passed, which obviated the necessity of the attempt on the part of the State of Arkansas to regulate the "supply of trains" engaged in interstate commerce, since these laws were enacted, and the important administrative functions delegated to and assumed by the Interstate Commerce Commission under the amendments to the Acts of Congress since such laws were passed upon by this Court; that said Arkansas statutes did not attempt to define the service required by the Extra Switchman and Extra Brakeman Laws with reference to the circumstances and conditions, so that the law would apply in proper cases and not otherwise; that said statutes took no account of the differences between the various roads, with improved trackage, equipment and switching facilities, but were made to apply to all railroads in the state "regardless of any modern equipment of automatic couplers and air brakes," and regardless of the fact that what might be necessary in the case of some railroads would be wholly unnecessary in others, and that the trackage, equipment and switching facilities

on the appellant's road at the time of filing of its petition and affidavits made unnecessary the employment of a third brakeman and the extra switchman as required by these statutes, all of which the motion to dismiss admitted.

G.

That to require an expenditure of $600,000.00 a year, without necessity for such outlay, in order to provide extra, unnecessary employes in the service of a common carrier, was an arbitrary exaction in the local interest, as admitted by the motion to dismiss, and the taking of property without due process of law, and that such absolute requirement could not be justified under the decisions of this Court. And the holding of the three-judge court that the Interstate Commerce Commission, under the powers delegated to it by Congress, was without authority to prevent such expenditures would enable the different states to prevent the entire comprehensive scheme and object of Congress in the amendment of the Act to Regulate Commerce by the Transportation Act of 1920, and particularly Section 1 of said Act as interpreted by this Court.

Colorado v. United States, 271 U. S. 153;
Alabama & Vicksburg R. Co. v. Jackson & Eastern Co., 46 Sup. Ct. Rep. 536, 537;
LaCoste et al. v. Dept. of Conservation, 263 U. S. 545;
Sanitary District of Chicago v. U. S., 266 U. S. 405;
Oregon & Washington R. & N. Co. v. State of Washington, 270 U. S. 87, 102.

ARGUMENT.

I.

Court Erred in Dismissing Cause.

The action of the three-judge court in sustaining the defendants' motion to dismiss is at variance with the rule of practice prescribed by this Court.

The conclusion of the Court against the federal right claimed under the Fourteenth Amendment overlooked the fact that a violation of this right was alleged to depend upon specific allegations of fact, which the motion to dismiss admitted. The plaintiff's petition alleged that the extra switchmen and extra brakemen laws of Arkansas were not used in standard railroad practice at the present time; that since said laws were passed, additions and betterments had been made to the road and equipment of the plaintiff's property in making stronger and more secure the rails, roadbed and bridges, reducing the grades, procuring heavier, stronger and safer engines and cars and safer power, so that today freight trains containing many more cars than those which could be safely operated when said laws were enacted could now be operated in Arkansas and through the other states where the plaintiff's lines extended. That such additions and betterments, costing many millions of dollars, had been made by the plaintiff for the express purpose of enabling it to increase its operating efficiency, economy and safety, and the running of larger and heavier freight and passenger trains, and that

said trains were commonly, safely and economically operated throughout the United States, and over lines substantially the same as plaintiff's lines extending through the State of Arkansas, without such extra switchmen and extra brakemen required by the Arkansas laws (Tr. Rec., pp. 6-7).

That there was no reason, from the standpoint of safety or from any other standpoint, why such extra switchmen and extra brakemen should be employed upon switch engines and freight trains operated through the State of Arkansas, and by reason of said expenditures for roadbed and equipment, and by increasing the length of freight and passenger trains and by consolidation of through freight traffic at origin terminals into trains which run through to terminals as far distant as circumstances would permit without being broken up, the plaintiff had been enabled, outside of the State of Arkansas, to effect great economies in operation, but the laws of Arkansas prevented the plaintiff from effecting such economies while operating its trains and engines into and through said state (Tr. Rec., p. 7).

That the standard crew engaged generally upon all the railroads of the United States outside the State of Arkansas consisted of switching crews of a foreman and two helpers and a standard freight crew of a conductor and two brakemen. That the laws of Arkansas complained of entailed an annual useless expenditure of $600,000.00 per year. Plaintiff also set up that by reason of these facts, said laws of Arkansas were in conflict with the Fourteenth

Amendment to the Constitution of the United States; that said statutes constituted an undue and unreasonable burden on interstate commerce in violation of the Commerce Clause of the Constitution; that said statutes were unreasonable and arbitrary; that they did not provide whereby the validity of the statutes could be tested; and that said statutes were in conflict with the general scheme of federal regulation provided for in the Interstate Commerce Act as amended by the Transportation Act of 1920, and were inconsistent with the jurisdiction of the Interstate Commerce Commission to which Congress, as an administrative measure, had delegated the entire subject attempted to be regulated by the said statutes of Arkansas (Tr. Rec., pp. 6, 8).

In view of these allegations of the petition, the action of the Court in sustaining the motion to dismiss, which admitted all the facts properly alleged, was clearly at variance with the established rule of practice prescribed by this Court in similar cases.

Where petition alleges a violation of the Fourteenth Amendment because of the enforcement of a state statute, under facts and circumstances pleaded as amounting to a deprivation of plaintiff's property without due process of law, it is error to sustain a motion to dismiss the petition without examining into the merits of the plaintiff's case, since the motion to dismiss admits the facts alleged and all legal inferences attaching thereto.

Georgia Power Co. v. Decatur, 281 U. S. 505;
Chicago Junction Case, 264 U. S. 262;

Great Northern R. Co. v. Minnesota, 238 U. S. 34 and 35;
Washington v. Fairchild, 224 U. S. 510;
Reagan v. Farmers Loan Co., 154 U. S. 412;
Groesbeck v. Duluth, 250 U. S. 607;
Mississippi v. Mobile & Ohio R. Co., 244 U. S. 388;
Smith v. Texas, 233 U. S. 630;
Banton v. Belt Line, 268 U. S. 413;
Lincoln Gas & Elec. Co. v. City of Lincoln, 250 U. S. 256;
Spring Valley Water Works v. San Francisco, 124 Fed. Rep. 574.

In the recent case of Georgia Power Co. v. Decatur (281 U. S. 505) Mr. Justice Butler said:

"The state may not, by any of the agencies, disregard the prohibitions of the Fourteenth Amendment. * * * **We are therefore required to pass upon the merits of petitioner's claim.**"

In the Chicago Junction case Mr. Justice Brandeis said:

"We must take that fact as admitted for the purposes of this appeal. The allegation is made as one of fact. There is no suggestion in the motions to dismiss (which are both general and special) that this fact is not well pleaded; or that a copy of the evidence introduced at the hearing should have been annexed to the bill. * * * To refuse to consider evidence introduced or to make an essential finding without supporting evidence, is arbitrary action. As it was admitted by the motion that the order was unsupported

by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiff" (264 U. S. 262).

The rule is laid down by Judge Van Devanter in Ward v. Love County (253 U. S. 20) as follows:

> "As a conclusion from these facts, the claimants asserted that the taxes were collected by Love County by coercive means, that their collection was a violation of a right arising out of a law of Congress and protected by the Constitution of the United States. * * * The facts set forth in the petition, all of which were admitted by the demurrer, **whereon the county elected to stand**, make it plain, as we think, that the finding or decision that the taxes were paid **voluntarily** was without any fair or substantial support."

And in Union Pacific v. Public Service Com. (248 U. S. 67), Mr. Justice Holmes said:

> "It is the duty of this Court to examine for itself **whether there is any basis in the admitted facts**, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived."

II.

Court Erred in Construing Car Service Section of Interstate Commerce Act.

In deciding that Congress had not occupied the field of regulating "the supply of trains" in sustaining the defendants' motion to dismiss, and thus holding that Section

1 of the Act to Regulate Commerce (41 Stat. 456, 475, 476) did not authorize the Interstate Commerce Commission, as an administrative body, to establish the "practice" regulating the supply of trains, the conclusion of the Court is directly opposite to that reached by the Interstate Commerce Commission in its interpretation of this same section of the Act to Regulate Commerce.

The definition of "Car Service" to include "and the supply of trains" was enacted, for the first time, in the Transportation Act of 1920 (41 Stat. L. 476). The term "Car Service," as it appeared in the Esch Car Service Act of May 29th, 1917 (40 Stat. L. 101), did not include "the supply of trains," but only included "the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this Act." In other words, the right of the Commission to regulate "the supply of trains" had not been included in the congressional legislation prior to the Transportation Act of 1920, and such power had not been conferred upon the Commission when the Arkansas Extra Brakeman and Extra Switchman Acts were before this Court and considered in the decisions upholding the legality of those statutes.

In re Train Service on Line of Northern Pacific, case No. 17,983 (112 I. C. C. Rep. 191), the Interstate Commerce Commission, on April 28, 1926, held as follows:

> "Respondent also moved to dismiss the proceeding upon the ground that in so far as it relates to passen-

ger service we were without jurisdiction and that with reference to the transportation of property the evidence showed that curtailed service, as proposed, was justified.

"The case presents, therefore, two questions, (1) whether the Interstate Commerce Act, as amended, gives us jurisdiction to regulate **the supply of trains**, (2) if the first be answered affirmatively, whether by the curtailment in service, as proposed, the respondent would furnish **adequate car service** which would be just, reasonable and lawful. We shall consider these propositions in the order stated."

* * * * * * *

"The State of North Dakota contends that it, through the Board of Railroad Commissioners, has sole jurisdiction over **train service** within the state and that we have no jurisdiction over **train service**. It relies principally upon the addresses and debates in Congress at the time the transportation act was under consideration as tending to show that it was the intention of the Congress that jurisdiction over such matters by this Commission was to be exercised only in times of emergency, and that we have no authority to regulate the usual freight service maintained on any line of railroad. In this connection reference is made to the decision of the Supreme Court of the United States in the case of Peoria Ry. Co. v. United States, 263 U. S. 528, as upholding this contention. The matter of train service was not before the Court. The question there presented was whether this Commission had authority, under given circumstances, to order a terminal carrier to switch, by its own engines and over its own tracks, freight cars tendered by or for

another connecting carrier. The Court was therefore considering whether we could under the emergency powers conferred by paragraphs 15 and 16 of section 1 of the act regulate switching of cars by one carrier for another, under the circumstances and in the manner there presented.

"Let us consider the provisions of section 1 of the act. Paragraph 10 provides:

" 'The term "car service" in this act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this act.'

"Paragraph 11 provides:

" 'It shall be the duty of every carrier by railroad subject to this act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service; and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful.'

"These are fundamental and basic provisions. Paragraph 10 defines the term 'car service.' Paragraph 11 sets forth the duty of carriers with respect to each and all of the matters included in the definition. We think that duty is continuous and not limited to times of emergency or otherwise. It is the duty of carriers to furnish safe and adequate car service. The terms are used with equal force. Could it be said that the duty of furnishing safe car service is in force only in

times of emergency? We think not, and the same is true with respect to the term 'adequate.' It is the duty of the carriers subject to the act to furnish 'safe and adequate' car service at all times.

"Paragraph 14 of section 1 provides that—

" 'The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad, including the practices with respect to car service by carriers by railroad, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.'

"Section 15 also provides—

" 'That whenever, after full hearing, upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, * * * the Commission shall be of the opinion that * * * any practice whatsoever of such carrier or carriers subject to the provisions of this act, is or will be unjust or unreasonable * * * or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what * * * practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, * * *.'

"From the foregoing it seems clear that the Interstate Commerce Act makes it the duty of every carrier subject thereto to furnish an adequate 'supply of trains' for the transportation of property, **and confers upon us authority to determine and prescribe, after full hearing, what practice in this respect is or will be just, fair and reasonable, to be thereafter followed, and to enter an appropriate order.**

"Conflict of jurisdiction similar to that here encountered has often been before the courts. In Missouri Pacific R. R. Co. v. Stroud, 267 U. S. 404, the Supreme Court of the United States said:

" 'It is elementary and well settled that there can be no divided authority over interstate commerce, and that acts of Congress on that subject are supreme and exclusive.'

"In Savage v. Jones, 225 U. S. 501, the Court said:

" 'When the question is whether a federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.'

"We accordingly find that jurisdiction to regulate the supply of trains for the transportation of property has been vested in us."

* * * * * * *

"The record shows that revenues derived from the line under consideration are not sufficient to defray the expense of the present service. It is also clear that the proposed curtailment in service will result in substantial savings. We believe the proposal can be made effective without impairing the service rendered to an extent that will be unjust or unreasonable. After careful consideration of all the facts of record, we find that the proposed discontinuance by respondent of daily mixed-train service on the branch line under consideration will not be unjust, unreasonable, or unlawful, and that the establishment in lieu of such daily train service of triweekly service will furnish adequate service to the communities served by such branch line. The proceeding will be discontinued.

"An appropriate order will be entered."

The decision of the three-judge court that the word "practice," as used in Sections 1, 13, 15 and 15a of the Transportation Act, is not broad enough to include the regulation of "the supply of trains" is at variance with the generally accepted meaning of the term. The essence of the word is "uniformity," and when the terms is used in an act of Congress to be dealt with by the administrative branch of the Federal Government with regulation and uniformity over a given subject matter, such as regulating "the supply of trains" or fixing of rates, then there is such uniformity contemplated as should demonstrate the error of the three-judge court in this case.

Nor. Pac. R. Co. v. Solum, 247 U. S. 477.

"Car service," as used in the statute, connotes the use to which the vehicles of transportation are put and contemplates a general, uniform use under the regulatory body, the Interstate Commerce Commission. The entire subject matter is entrusted to the Interstate Commerce Commission and the states have no duty to perform in this regard.

Gardner v. L. & N. R. Co., 212 Ky. 540, 279 S. W. Rep. 947.

The reasonableness of all rules touching "car service" and "the supply of trains" under the act of Congress is for the Interstate Commerce Commission.

Penn. R. Co. v. Puritan Mining Co., 237 U. S. 121.

A "train," within the meaning of this statute, is an aggregation of cars drawn by a locomotive upon a railroad engaged in interstate commerce, as distinguished from switching operations or assembling cars in railroad yards.

U. S. v. Nor. Pac., 254 U. S. 251;
U. S. v. C. B. & Q. R. Co., 237 U. S. 410;
Louisville Bridge Co. v. U. S., 249 U. S. 534.

In Morrisdale Coal Co. v. Pa. R. R. Co. (230 U. S. 304), where the question of the reasonableness of a rule of car distribution was before this Court, it was held:

"The question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the Pitcairn case, 215 U. S. 481, and in I. C. C. v. Illinois Central, 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated."

In the case of Pennsylvania R. R. Co. v. Puritan Coal Co. (237 U. S. 121) the plaintiff's case was to recover damages occasioned by unjust discrimination in the supply of coal cars. This Court said:

"But it must be borne in mind that there are two forms of discrimination, one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discrimination of the administrative power, which has been vested by Congress in the Commission. It is for that body to see whether the rule unjustly discriminates against one class of shippers in favor of another."

III.

Congress Has Vested Regulation of "Train Supply" in Interstate Commission.

The decision of the three-judge Court in this case that Section 1 of the Act to Regulate Commerce does not vest in the Interstate Commerce Commission the power to regulate "the supply of trains" is directly opposed to the language of the Act to Regulate Commerce and to the decisions of this Court construing said act.

Section 1, Paragraph 3 of the Act to Regulate Commerce, provides:

> "The term 'transportation' as used in this act shall include locomotives, cars and other vehicles."

Section 1, paragraph 10, of the act provides as follows:

> "The term 'car service' in this act shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property, including special types of equipment, and **the supply of trains by any carrier subject to the act.**"

Section 1, paragraph 11, provides:

> "It shall be the duty of every carrier by railroad subject to this act to furnish **safe and adequate car service** and to establish, observe and enforce just and

reasonable rules, regulations and practices with respect to car service; and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful."

Section 1, paragraph 14, provides:

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad."

By these sections Congress, in 1920, delegated specifically to the Interstate Commerce Commission, as an administrative body, the absolute and exclusive right to regulate "**the supply of trains** by any carrier subject to the act." And the Commission is expressly authorized to "establish reasonable rules, regulations and practices with respect to car service." When car service is, by the provision of the act itself, defined as including the right to regulate "**the supply of trains,**" it should be plain that Arkansas, nor any of the other states, can regulate or condition the length of freight trains, with this power specifically vested by Congress in the Interstate Commerce Commission.

As said by the Interstate Commerce Commission in Re Irregularities in Mine Ratings (25 I. C. C. 286, 293):

"If the carriers were to equip themselves with cars, motive power, tracks and terminals, so as to meet

at any moment the maximum demand for transportation, the shipping public would be obliged to pay interest upon that investment and for the maintenance of those facilities."

Paragraph 21 of Section 1 provides as follows:

"The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this act party to such proceeding to provide itself with **safe and adequate facilities** for performing as a common carrier its car service as that term is used in this act, and to extend its line or lines; provided, that no such authorization shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, **or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public.**"

In view of these specific provisions of the amended Act to Regulate Commerce, it seems impossible to escape the conclusion that the regulation of car service, including "the supply of trains," is an administrative function, depending upon the exercise of the expert knowledge and judgment of the Commission which shall be exercised consistently with **"the expense involved therein which will not impair the ability of the carrier to perform its duty to the public."**

This conclusion is further borne out by section 15 (a),

relating to rates, wherein the provision is made for "reasonable expenditures for maintenance of way, structure and equipment."

And by Paragraph 12 of Section 1 of the Act to Regulate Commerce the Commission is to supervise the "just and reasonable distribution" of cars so that the "safe and adequate" facilities for performing by a common carrier its car service duty shall be safeguarded to the public.

Both by the express provisions of the Transportation Act of 1920 and the defined purpose of Congress in its enactment, the exclusive right to regulate car service and "the supply of trains" was vested within the administrative discretion of the Interstate Commerce Commission. The object of the Transportation Act is thus stated by this Court in Wisconsin Commission v. C. B. & Q. R. R. (257 U. S. 563, 585):

> "Therefore, the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provision of the law that inured to the benefit of the carriers was the requirements that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered, and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates, and to take other important steps to maintain an adequate railway service for the people of the United States."

In the New England Division Case (261 U. S. 184) this Court said:

> "The effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 Act sought to insure also **adequate transportation service.**"

In the Dayton-Goose Creek case the Court said:

> "To achieve this great purpose it puts the railroad systems of the country, more completely than ever, under the fostering guardianship and control of the Commission which is to supervise their issue of securities, **their car supply and distribution,**" etc.

Dayton-Goose Creek Co. v. U. S., 263 U. S. 477.

Surely, the duty cannot be shifted from the Commission, whether the train or car supply is for the benefit of shippers or for the benefit of employes of the carrier? The question is still an administrative one and depends upon the expert knowledge and discretion of the body delegated by Congress with the performance of this function.

By paragraph 13, section 1, the Commission is authorized "by general or special orders to require all carriers by railroad subject to the act or to any of them, to file with it, from time to time, their rules and regulations with respect to car service."

By paragraph 14, section 1, the Commission is further authorized to "establish reasonable rules, regulations and

practices with respect to car service by carriers, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier."

When the Commission is thus delegated by Congress with the performance of this function, how can it be contended, under a law such as the Arkansas Extra Brakeman Act, that attempts to regulate the length of freight trains to twenty-five cars in that state upon certain conditions, is not a "practice" over which the Commission has any jurisdiction?

The jurisdiction regarding car service, vested by Congress under Section 1 of the Act to Regulate Commerce in the Interstate Commerce Commission, is, in its very nature, administrative in character:

(a) The car supply of the United States must be treated as a whole in order to meet the demands of business and to "provide the people of the United States with adequate transportation," expressly declared in section 15a of the act to be one of the purposes of the legislation. No carrier is able to hold all of its cars on its own line. It is common knowledge that probably one-third of the cars owned by any carrier are at certain times on other lines. This is true of all the railroads in the United States. This emphasizes the necessity that the question of car supply is to be considered in a broader way than along mere sectional or state lines. This cannot be done by any tribunal except an expert body. With the power of the Government behind it, the Commission can make the

investigations which are necessary, and by reason of its expert advice and the peculiar work in which it is engaged it is a body of trained experts for the settlement of questions of this nature.

(b) Not only must the general car situation be considered as affecting the "car service" by the carriers of the United States, but it is necessary that attention must be paid in the financial situation. This is true from the nature of the duties devolving upon the Commission under paragraph 21 of section 1 of the act.

A carrier, by the Transportation Act, is not required to bankrupt itself in order to comply with such regulations as the Arkansas Full Crew Bill. As said by the Commission in one case:

> "If carriers were to equip themselves with cars, motive power, tracks and terminals so as to meet at any moment the maximum demand for transportation, the shipping public would be obliged to pay interest upon that investment and for the maintenance of those facilities" (25 I. C. C. 286, 293).

This is equally true of such legislation as the Arkansas Full Crew and Full Switching Crew Laws.

(c) Another important factor to be taken into consideration is the ability of the carrier to secure motive power to move such additional trains required to transport its freight in freight trains of only twenty-five cars in length. If one state can prescribe that only freight trains of twenty-five cars in length should be used to transport the interstate commerce of the country, another state can provide that trains not over five or ten cars in length shall alone be operated within its

borders, and the carrier must purchase equipment and motive power to operate all these additional trains. Such requirements would be wholly inconsistent with the comprehensive object of the Transportation Act.

(d) In addition to this, it must be remembered that the interest of the general public is just as important as that of the carrier and its employes. The interest of 120,000,000 of people is more important than the question of whether additional brakemen and additional switchmen shall be employed in any given state.

(e) Finally, the jurisdiction conferred upon the Commission by the car service sections of the Act to Regulate Commerce is administrative in its nature because it involves the consideration and determination of what constitutes a reasonably safe and adequate car supply, including the right to regulate "the supply of trains," and into this question there must necessarily enter various elements which the state Legislatures are not properly qualified to pass upon,

> "• • • for the adequate appreciation of which, acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts."
>
> Great Northern R. R. Co. v. Elevator Co., 259 U. S. 285.

The car service section of the act expressly authorizes the Commission to require any carrier to provide itself with such "safe and adequate facilities for car service," unless the Commission finds that "the expense involved

therein will not impair the ability of the carrier to perform its duty to the public."

The Commission is thus directed to consider any regulating "**practices**" of railroads regarding cars and "the supply of trains," the financial condition of the carrier, whether the expenditure will be justified by increased earnings, or whether the shipping public will be obliged to pay interest upon the investment and for the maintenance of the facilities, the needs of the class of shippers for whose use additional facilities are demanded, in order that the Commission may see to it that the proper service is rendered "in the interest of the commerce of the United States considered as a whole" (paragraph 5, section 15a).

Thus, by section 1 and section 15a, the advisability of the expenditure must be considered in view of the relation of the carrier to the transportation needs of the country as a whole—and not with regard to the employes of a given state—and particularly in relation to the rate group or territory to which it may be assigned by the Commission.

In prescribing the employment of employes based upon the unreasonable requirement that freight trains shall not exceed 25 cars in length, what concern has the Arkansas Legislature in regard to the specific duty delegated to the Interstate Commerce Commission "to see to it that all expenditures for equipment are reasonable"?

In fact the provision of the Arkansas Extra Brakeman Act, limiting the length of a freight train to twenty-five cars, is operative "regardless of any modern equipment of automatic couplers and air brakes" (Tr. Rec., p. 4).

It must necessarily be held that the rate-making duties provided by section 15a are administrative in their nature and within the exclusive jurisdiction of the Commission.

Abilene Cotton Oil Case, 204 U. S. 426.

This being true, it is submitted that a construction cannot be justified which would hold the duties of a like nature, involving highly technical knowledge and investigation, such as regulating "car service" and "the supply of trains," as provided in section 1 of the act, when the paramount purpose is to secure uniformity just as much as in the case of rates, are not administrative in character but are within the concurrent jurisdiction of the Commission and the different states.

The term "car service," which includes the movement of engines and cars and the supply of trains and the furnishing of safe car service, necessarily includes the number of men required to operate such trains.

As said by Mr. Justice Brandeis, in the case of

Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co., 271 U. S. 244,

"The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so shows that the jurisdiction of the Commission over such connections must be exclusive if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively per-

formed. Moreover, the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction" (271 U. S. 244).

In the Dayton Goose Creek case (263 U. S. 477), this Court said, regarding the Transportation Act:

"It aims to give the owners of the railway an opportunity to earn enough to maintain their operations and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Interstate Commerce Commission, which is to supervise their issue of securities, **their car supply and distribution,** their joint use of terminals, their construction of new lines, their abandonment of old lines, and by the proper division of joint rates and by fixing adequate rates for interstate commerce to secure a fair return upon the properties of the carriers engaged."

If the different states and the Interstate Commerce Commission are to both have jurisdiction over the safety and adequacy of "car service" and "the supply of trains," then there could be no uniformity in the enforcement of the act of Congress. This must result from the following illustration:

The plaintiff is a common carrier with a total mileage of 10,000 miles, 1,700 of which extend into and through the State of Arkansas. It has a total car supply of 50,000 freight cars which are divided between ten different states in the Middle West, based upon the density of the freight traffic in those states, together with engines sufficient to move all of those trains in cars of the average length of freight trains prevailing throughout the United States of from fifty to one hundred cars in length. If the State of Arkansas, by its legislative act, can require that all the freight trains operated in that state shall be only in trains of twenty-five cars, and the average length of a freight train is from fifty to one hundred cars, then it would require two or three times the motive power and employes to operate trains in Arkansas that it does in the other states where the plaintiff operates freight trains of two or three times that length with one engine and a standard freight crew, and thus the uniformity and the service to the public which the Transportation Act intended to safeguard is destroyed because of the inconsistent regulations of such legislative acts upon the part of the different states.

By these provisions of Section 1 of the Act to Regulate Commerce, as amended in 1920, the Interstate Commerce Commission is given complete jurisdiction by Congress to regulate "the supply of trains," whereas the Arkansas Extra Brakeman Bill attempts to usurp this function and to vest in the Attorney-General and Prosecuting Attorneys

of the State of Arkansas the power to recover penalties against the common carriers of the state, engaged in interstate commerce, for their failure to respect a state law limiting the length of freight trains to twenty-five cars. We submit that such legislation is clearly inconsistent with the car service sections of the Act to Regulate Commerce, as amended in 1920.

IV.

Interstate Commerce Commission Is Authorized to Regulate Carrier Expenditures.

The defendants, before the three-judge court, contended that "the Commission has been given no affirmative power to regulate the discretion of the management to determine what practices are efficient and economical." In the O'Fallon case the Interstate Commerce Commission expressly held that it had power to regulate the expenditures of a carrier and to hold such expenditures within the legislative limits of what were "economical" and "reasonable." The Commission, in its opinion in the O'Fallon case, and the decision of this Court in the O'Fallon case should be a clear refutation of this argument.

In the case of Excess Income of St. Louis & O'Fallon Ry. Co. (124 I. C. C. 5) Commissioner Meyer, for the Commission, took up in the course of the Commissioner's report:

"Third, the propriety of certain dispositions of income through charges to operating expenses during the respective recapture periods."

In the course of its opinion the Commission considered the payments made by the carriers to its president and general manager and upon this issue it said:

"The president of the two companies, William Cotter, assumed his duties as president in 1916 at annual salaries of $6,000 from each carrier, or a total annual compensation from these carriers of $12,000. In 1920 his salary as president of the O'Fallon was increased to $10,000, making his total annual compensation from these roads $16,000. * * * The O'Fallon paid to its president the full amount of $25,000. agreed to in the minutes quoted. * * * In 1916 August A. Busch received a salary of $2,400 as chairman of the board of directors of the O'Fallon and a like salary as chairman of the board of directors of the Manufacturers, * * * effective April 1, 1923, pursuant to the first paragraph of the quoted minutes, his salary as chairman of the board of directors of the O'Fallon was increased from $2,400 to $15,000 per annum, and effective the same date, his salary for a like position of the Manufacturers was established at $3,000 per annum. * * * In construction and repair of railway equipment (107 I. C. C. 721), and prior reports in the same proceeding, we had before us the question of the reasonableness of the cost of repair of equipment, and in the cited case said, at page 735:

"'Without attempting to draw the exact line, the record compels us to regard a substantial

portion of the extraordinary expenditures incurred by respondent in this outside repair work as improvident and of a character which should be considered when fixing rates to yield the standard return, as provided by the act.'

"In considering the charges for compensation to the president and chairman of the board of the respective carriers as outlined above, we must bear in mind the purposes of the enactment of section 15a and the opinion of the Supreme Court of the United States respecting the disposition of income of carriers as controlled by the statute, as stated in Dayton-Goose Creek Ry. v. U. S., supra, where the Court said, at page 484:

" 'The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such title to the excess as to render the recapture of it by the Government a taking without due process.'

"It is evident from a consideration of all the circumstances surrounding the transactions referred to that all payment to the president of the O'Fallon of the $25,000, received from the Suburban out of increased divisions for past shipments and the increase in the salary of the chairman of the board in contemplation of a continuance of increased divisions in the future is without any further justification than the availability of funds from the sources indicated. In

view of the fact that the statute, as was recognized by the Supreme Court in the above quotation, makes the excess earned by an interstate railroad over a fair return on the value of its property a trust fund for the United States, we think it improper for the O'Fallon to have diverted to 'operating expenses' the portion of such trust fund represented by the increased compensation to the president and the chairman of the board of directors."

* * * * * * *

"The provision of paragraph (9) of section 15a which empowers us to 'prescribe rules and regulations for the determination and recovery of the excess income' is, in our opinion, broad authority for such adjustments of net railway operating income as are here involved. **Without such authority there would be nothing to prevent virtual defeat of the recapture provisions by the diversion of funds through unwarranted charges to operating expenses.**

* * * * * * *

"In our administration of section 15a we may not permit the purpose of the act to be defeated by the distribution under the guise of operating expenses of what is in reality excess income. * * * Manifestly considerable latitude must be given the officers of a carrier determining what are reasonably necessary charges to operating expenses, but the evidence clearly indicates that the charges here in question were not within any latitude that may properly be alleged. We are, therefore, bound to exclude such sums from consideration in our determination of net railway operating income for the period during which such charges occurred" (124 I. C. C. 12, 14, 15, 16, 17).

In considering the O'Fallon case, Mr. Justice Brandeis, in his opinion, in which Justices Sutherland and Stone concurred, in considering the report of the Commission, used the following language:

> "To make such a determination justly, the Commission must have the data on which a competent and vigilant management would insist when required to pass upon the advisability of making correct expenditures, and the Commission would be obliged to give them the same careful consideration" (St. Louis & O'Fallon v. U. S., 279 U. S. 533-34).

The report of the Commission in the O'Fallon case as to its power to go into a carrier's expenditures is a clear refutation of the position maintained by counsel for the defendants, that the Commission has no authority over the expenditures of a carrier, in order to justify this Court to hold that the states, or the carriers themselves, may fritter away their income at will. Such a contention is also further refuted by the finding of the Commission in Ex Parte 74. Such statement is also refuted by the finding of the Commission in case No. 12,066, where the Erie Railroad was compelled to desist from its "**practice**" of having its equipment repaired by contractors (128 I. C. C. 323-345), because such "**practice**" was neither efficient nor economical management. And such contention is also disputed by the decision of the Commission in case No. 16,067, known as "Maintenance of Way Expenditure of Pittsburgh & Lake Erie Railroad," where the Com-

mission, on January 2, 1928, held that the "practice" of the Pittsburgh & Lake Erie Railroad was not justified in expenditures made through contractors in the maintenance of way and labor for the upkeep of its property (136 I. C. C. 527-535). These cases should demonstrate to the Court that, under Sections 15 and 15a of the Transportation Act of 1920, Congress delegated to the Commission power to inquire into the reasonableness of the common carrier's expenditures subject to the act.

If counsel for the defendants is right in the contention that the Commission has no authority to regulate expenditures of common carriers, then, of course, that portion of section 15a, providing for the recapture by the Government of all over 6 per cent is nugatory, and the logic of the O'Fallon decision is swept away by force of the argument that the Commission is powerless to preserve the fund which, by its own order, it has created.

The Interstate Commerce Commission is the agency set up by Congress to create and preserve the income of the carriers and the interest of the Government in the excess over the 6 per cent.

If the carriers of the country can, without restriction, spend any amount they see fit, then the power of the Commission in this respect can be wholly defeated.

V.

Commission Can Regulate "Practice" Regarding "Supply of Trains."

Under the Interstate Commerce Act, as amended in 1920, the exclusive power is vested by Congress in the Interstate Commerce Commission as an administrative body to determine the reasonableness of the "practice" which the Arkansas Full-Crew Law attempts to regulate and for which the prosecutions in this case were instituted.

The definition of "Car Service" to include "and the supply of trains" was enacted, for the first time, in the Transportation Act of 1920 (41 Stat. L. 476). The term "Car Service," as it appeared in the Esch Car Service Act of May 29, 1917 (40 Stat. L. 101), did not include "the supply of trains," but only included "the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this act." In other words, the right of the Commission to regulate "the supply of trains" had not been included in the congressional legislation prior to the Transportation Act of 1920, and such power had not been conferred upon the Commission when the Arkansas Extra Brakeman and Extra Switchman Acts were before the Court and considered in the decisions upholding the legality of those statutes.

In United States v. Pacific & Artic Ry. & N. Co. (228 U. S. 87), the Court said:

> "The contentions of the Government would be formidable, indeed, if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. * * * The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

In P. R. R. Co. v. International Coal Co. (230 U. S. 184), the Court, at pages 196 and 197, said:

> "Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administration and rate regulatory body. For the reasonableness of rates and the permissible discrimination based upon the difference in conditions are matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

In Mitchell Coal & Coke Co. v. P. R. R. Co. (230 U. S. 247), the Court said:

* * * * * * *

"If the decision of such question was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

On pages 256 and 257:

* * * * * * *

"But since the Commission is charged with the duty of determining whether the **practice** was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the **practice** or the rate was thus unreasonable and, therefore, illegal and prohibited."

At page 313 of the opinion in Morrisdale Coal Co. v. P. R. R. Co. (230 U. S. 304), the following language is used:

"* * * The question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the Pitcairn case, 215 U. S. 481, and in I. C. C. v. Illinois Central, 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to

make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonableness of a method of alloting cars, neither can it do so as an incident to an action for damages."

Under a rule laid down by the Supreme Court in the case of Great Northern Ry. Co. v. Merchants Elevator Co. (259 U. S. 285), whenever the issue involved is one of fact as to the reasonableness of a given **practice**, or the sufficiency of the carrier's rules regulating car supplies, **or the movement of trains**, then the Interstate Commerce Commission must perform its administrative function before any state law or a rule of the state Commission can affect the practice of the carrier regarding car service. The decisions of the Interstate Commerce Commission are to the same effect.

In Vulcan Coal & Mining Co. v. I. C. R. R. Co. (33 I. C. C. 52), the Interstate Commerce Commission, after reviewing the decisions of the Supreme Court regarding its jurisdiction, said:

"Furthermore, one cannot escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the Commission alone can take original jurisdiction. This must be true unless it be the carrier's absolute duty to furnish cars at all times to the full extent of the shipper's demands.

> • • • By virtue of these requirements it becomes the carrier's duty to maintain a reasonably adequate car supply, and the question of what is reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate. The legal sufficiency of defendant's car supply cannot be definitely fixed by the statute. It is a question which, using the language of the Court in the Mitchell case, 'involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of' this tribunal."

If this is true as to cars, prior to the Amendment, since 1920 it is equally true as to "supply of trains."

From the decisions of this Court and the Interstate Commerce Commission it should be apparent, since the amendment to the Act to Regulate Commerce, that the question of car supply is, to use the language of the Interstate Commerce Commission, "just as much an administrative one as the question of what is a reasonable rate." The conditions governing the movement of trains and practices of the carrier are necessarily of an administrative character, and resort to the Commission and the determination by that body of the reasonableness of a given practice touching the supply of cars, or the movement of trains, is a *sine qua non* of the jurisdiction of the various state regulatory bodies before any jurisdiction can be recognized by the different states. That this is true is borne out by the language of the Commission in Armour Grain Co. v. Director General (57 I. C. C. 398-401), and the decision of

the Commission in the "Car Supply Investigation" (42 I. C. C. 657).

Clearly the question of what constitutes a proper "**practice**" regarding train supply, train movements and car supply under the act is just as much an administrative question as the issue as to what constitutes a reasonable rate. A reasonable rule of "practice" affects the public just as much as does a reasonable rate or lawful tariff, and neither can be determined by the states.

In Great Northern Ry. Co. v. Elevator Co., 259 U. S. 285, 291, this Court said:

> "Whenever a rate, rule or **practice** is attacked as unreasonable or as unduly discriminatory, there must be preliminary recourse to the Commission."

If each of the different states were permitted to pass train-limit bills such as the Arkansas Full-Crew Act, the carriers would soon be unable to perform their duties to the public. This for the reason emphasized in the decisions of this Court and the Interstate Commerce Commission in the following cases:

In Interstate Commerce Commission v. Ill. Cent. R. R. Co., 215 U. S. 452, 60, the Court said:

> "Notwithstanding full performance by railway carriers of the duty to have a legally sufficient supply of coal cars, it is conceded that unforeseen periods arise when a shortage of such cars to meet the demand for the transportation of coal takes place, because, among

other things, (a) of the wide fluctuation between the demands for the transportation of bituminous coal at different and uncertain periods; (b) the large number of loaded coal cars delivered by a carrier beyond its own line for transportation over other roads consequent upon the fact that the coal produced at a particular point is normally distributed for consumption over an extensive area; and (c) because the cars thus parted with are subject to longer detentions than usually obtain in the case of shipments of other articles, owing to the fact that bituminous coal is often shipped by mining operators to distant points to be sold after arrival and is hence held at the terminal points awaiting sale; or because, owing to the cost of handling coal and the difficulty of storing such coal, the car in which it is shipped is often used by the shipper or purchaser at the terminal points as a convenient means of storage or as an instrument for delivery, without the expense of breaking bulk, to other and distant points."

The Supreme Court in Penna. R. R. vs. Puritan Coal Co., 237 U. S. 121, 122, said:

"Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But this is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made, and which it could not reasonably have been expected to meet in full."

In the case of

Midland Valley R. R. Co. v. Barkley et al.,
276 U. S. 482,

the Supreme Court of the United States held that an action against a railroad for damages for failure to furnish cars for use in interstate shipments of coal during a car shortage involved such an administrative question as to give the Interstate Commerce Commission exclusive jurisdiction, and jurisdiction of the state court, under Section 895, Crawford & Moses' Digest of the Statutes of Arkansas, was held superseded.

In deciding the case, Mr. Justice Brandeis said:

> "The assertion that no administrative question is here involved rests upon a misapprehension. It may be assumed that there was **no order of the Commission** which required the Midland to distribute all available open-top cars among the tipple mines. But the reasonableness of the Midland's practice in doing so and in allotting box cars to the wagon mines was the substantial matter in controversy. * * * **The reasonableness of the rule adopted by the carrier is a matter for the Commission,**"

citing

Penna. R. R. Co. v. Puritan Coal Co., 237 U. S. 121.

VI.

Commission's Jurisdiction Is Exclusive.

When the courts hold that Congress has so taken possession of the subject of distribution of railroad cars and "the supply of trains" by vesting in the Interstate Commerce Commission complete jurisdiction to regulate the distribution of such cars and "the supply of trains," and that the occupation of this field has invalidated provisions of state statutes regarding such distribution when applied to interstate commerce, then the states are without authority to pass such laws as the Arkansas Full Crew or Extra Switchmen bill, and such statutes must be held unconstitutional.

C. R. I. & P. v. Elevator Co., 226 U. S. 426;
Oregon R. Co. v. Martin, 229 U. S. 606;
Chicago R. Co. v. Beatly, 234 U. S. 753;
Hampton v. St. L. I. M. & S., 227 U. S. 456;
Ill. Cent. v. Mulberry Coal Co., 238 U. S. 275;
Davis v. Wire Co., 317 Ill. 278, 148 N. E. 47;
Utilities Com. v. B. & O. R. R., 281 Ill. 405, 118 N. E. 81;
L. & N. v. Brashear, 217 Ky. 439, 289 S. W. 1094;
State v. P. S. C., 95 Wash. 274, 162 Pac. Rep. 523.

And within the decisions of this Court this applies as well to terminal service where the distribution of cars, or the practice of the carrier, is involved, since the switch-

ing movements are an ingredient of the interstate transportation and are free from state regulation:

Ill. Cent. v. De Fuentes, 236 U. S. 157.

And, see

Lambert Coal Co. v. B. & O., 257 U. S. 377;
Penn. R. R. Co. v. Puritan Coal Co., 237 U. S. 121.

VII.

Where Congress Occupies Field, Not Necessary for Commission to Act.

In

Missouri Pacific v. Porter et al.
(273 U. S. 342)

the question decided was whether the subject of regulating the provisions of bills of lading had been acted upon by the Commission in pursuance to the Act to Regulate Commerce. It was admitted that the Commission had not prescribed the form of the bill of lading, but, because Congress had occupied the field, this excluded all state authority, although the Commission had not prescribed the form, the Court, through Mr. Justice Butler, saying:

> "The question is whether Congress has entered upon the regulation of provisions in bills of lading affecting liability of railroads for loss of property received by them for transportation over an interstate inland route to a seaport for delivery to a foreign

vessel for ocean carriage to a nonadjacent foreign country. * * * No Act of Congress or order of the Commission prescribed a form of bill of lading for this shipment. The defendants in error rightly say that the Carmack Amendment, the Cummins Amendment or section 25 does not apply to such a shipment. But that does not sustain their contention that Congress has not evinced an intention to regulate bills of lading for transportation such as is here involved. Section I (in paragraph 6) extends to all carriers and to all transportation subject to the act * * *. And the Commission is empowered and directed to enforce the rule.

"* * * Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme, and, as that power has been exerted, state laws have no application. They cannot be applied, in coincidence with, as complementary to, or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

Napier v. Ry. Co., 272 U. S. 605;
Pennsylvania Co. v. Pub. Serv. Com., 250 U. S. 566;
R. R. Co. v. Varnville Co., 237 U. S. 597;
Prigg v. Pennsylvania, 16 Pet. 539;
Houston v. Moore, 5 Wheat. I, 21, 22.

In

C. R. I. & P. Ry. Co. v. Elevator Co.
(226 U. S. 426)

the Supreme Court held that, by the Hepburn Act, the delivery of cars for interstate shipment was regulated by Congress, and that the Minnesota Reciprocal Demurrage Law was void. In the course of the opinion Mr. Chief Justice White, for the Supreme Court, said:

> "In the original Act to Regulate Commerce the term 'transportation' was declared to embrace **all** instrumentalities and facilities of shipment or carriage. By the Hepburn Act it was declared that the term 'transportation'
>
> > "'shall include cars and other vehicles and **all instrumentalities and facilities of shipment or carriage**, irrespective of ownership or of any contract, express or implied, for the use thereof, and **all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.**'
>
> • • • • • • • •
>
> "As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the state over the subject matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. • • • It results, therefore,

that in a case where from the particular nature of a certain subject the state may exert authority until Congress acts under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the state impotent to deal with a subject over which it had no inherent but only permissive power."

226 U. S. 435.

In the case of

Midland Valley R. R. Co. v. Barkley et al.
(48 Sup. Ct. Rep. 342)

the Supreme Court of the United States held that an action against a railroad for damages for failure to furnish cars for use in interstate shipments of coal during a car shortage involved such an administrative question as to give the Interstate Commerce Commission exclusive jurisdiction, and jurisdiction of the state court, under Section 895, Crawford & Moses' Digest of the Statutes of Arkansas, was held superseded, although the Commission had not acted.

State legislation providing the sort of equipment to be used on locomotives engaged in interstate commerce was held invalid in the case of

Napier v. Atl. Coast Line R. R. Co.
(272 U. S. 605)

upon the ground that the Boiler Inspection Act was intended by Congress to occupy this entire field.

See, also:

Public Utilities Commission of Ohio v. Penna. R. R. Co., 151 I. C. C. 448-449.

VIII.

Commission Has Acted in Similar Cases.

Congress has not only delegated to the Commission the power to fix rates and to take into consideration the reasonableness of expenditures for labor and other operating expenses, but the Commission, in many cases, has actually entered upon the performance of this duty.

In Ex parte 74, following the enactment of the Transportation Act, the Commission entered upon the duty, imposed upon it under section 15-A of said act, of ascertaining what rates would constitute "a fair return" to the carriers in the Eastern, Southern and Western rate groups.

In considering this subject the Commission said:

> "Much has been said upon the present record concerning the necessity of additional equipment and the efficiency of the present management of the carriers. It is the view of the carriers that existing facilities are inadequate, and they state specifically that they need immediately at least 100,000 freight cars, 2,000

locomotives and 3,000 passenger cars. Shippers are unanimously of the opinion that the transportation service has been and is unsatisfactory, and many of them urge upon us the necessity of granting such increased rates as may be necessary in order that the service may be improved. Others raise the question whether considerations other than inadequacy of facilities—notably labor difficulties—are not equally responsible for the admittedly poor service. **Especially during recent months a shortage of labor at crucial points, due in part to strikes, has contributed more largely than any other single factor to the unsatisfactory condition that has existed and still exists. Witnesses for the carriers were unable to state explicitly what economies in operation, if any, may be presently effected.** On the other hand, the opinion was expressed that certain increases in operating expenses are apparently unavoidable. During the war, passenger traffic was unusually remunerative because of troop movements, elimination of unnecessary trains, and heavy loading of passenger cars. The movement of troops has practically ceased, and it is the view of the carriers that a larger number of passenger trains will have to be operated. During the war, in part because of war necessity, there was a marked increase in the loading of freight cars. **It is apparent that there may be increases in expenses not related to the general increase in prices, which may offset any economies that may be effected in other directions."**

* * * * * * *

"The probable earning capacity of the properties under particular rates prescribed by law and the sums

required to meet operating expenses, separately and collectively, are indicated in the record."

* * * * * * *

"The proposals of the carriers as originally presented and as considered throughout the hearings made no allowance for increased wages of railway employes not then effective. **In the course of the hearings it was stated that a decision of the United States Railroad Labor Board would soon be forthcoming granting certain increases in the wages of railway employes, and it was generally agreed that we should give due consideration to the award of that board when made.** On July 20, 1920, after the close of the hearings and oral argument, the Labor Board announced a decision awarding approximately $618,000,000.00 as increased wages. In discussing the results of operation in each group we shall deal first with the evidence as presented, without reference to the award of the Labor Board, and shall thereafter **refer to the wage award and to its effect upon the operating expenses of the carriers in the several groups.**"

* * * * * * *

"For the period of five years, beginning with 1912 and ending with 1916, the Eastern carriers were spending out of every dollar of operating revenue received approximately 71 cents for operating expenses. This increased to 75.03 cents in 1917, to 85.82 cents in 1918, to 88.51 cents in 1919, and to 97.68 cents in the first four months of 1920."

* * * * * * *

"It is estimated that the wage award made by the Labor Board under date of July 20, 1920, will add ap-

proximately $314,562,000.00 annually to the operating expenses of the carriers in the Eastern group. This is equivalent to 12.2 per cent of the total railway operating revenue of the Eastern carriers, as finally adjusted by them for the constructive year."

* * * * * * *

"It is estimated that the wage award made by the Labor Board under date of July 20, 1920, will add approximately $68,598,000.00 annually to the operating expenses of the carriers in the Southern group. This is equivalent to 11.8 per cent of the total railway operating revenue of the Southern carriers as finally adjusted by them for the constructive year."

* * * * * * *

"The carriers estimate that the wage award made by the Labor Board under date of July 20, 1920, will add approximately $234,840,000.00 annually to the operating expenses of the carriers in the Western group. This is equivalent to 11.2 per cent of the total railway operating revenue of the Western carriers, as finally adjusted by them for the constructive year."

* * * * * * *

"The carriers' original petitions asked for percentage increases in freight revenue only. In their reports to us, revenue from switching and certain other special services is stated separately from freight revenue, and, therefore, accepted literally, the proposal would result in no increases on switching service."

58 I. C. C. 227, 229, 231, 233, 234, 237, 239 and 242.

In considering the question of labor as pertinent to the performance of its duty to fix remunerative rates for the carriers, the Commission, in the same case, also said:

> "To enable the carriers to meet the present situation, **every man and group of men, whether employers or employes, must realize that they are in fact performing a public service. The spirit of duty and service must actuate all.**"
>
> 58 I. C. C. 260.

In case numbered 13,623, Arkansas City Sand Co. v. Frisco Railway (102 I. C. C. 559), the Commission was called upon to consider the reasonableness of the switching rates of the Frisco road at Arkansas City, Kansas. In this connection it went fully into the cost of labor and the yard engine-hour cost for the service rendered, with the conclusion that the cost had not been sufficiently established to authorize an increase in the switching rate, the Commission concluding:

> "To arrive at the average cost per car handled in the yard during any given period, it is necessary to know the total expenses chargeable to yard switching and the total number of cars handled, both loaded and empty. No test was made to determine the proportion of the expenses chargeable to yard switching and road-haul services."

For this reason the Commission held that "the evidence is insufficient to show the nature and extent of the services

performed, * * * and the allegation of undue prejudice and preference, therefore, has not been sustained."

Arkansas City Sand Co. v. Frisco Ry., 102 I. C. C. 569, 570, 572.

In case numbered 12,066, involving the construction and repair of railway equipment by the Erie Railroad, the Commission, upon its own motion, entered upon an investigation concerning the practice of the Erie Railroad to have its equipment repaired by contractors, to whom it paid a certain per cent of profit over and above the fixed charges. The Commission found that:

> "The leasing of respondent's marine repair yard and floating equipment to a private concern, the arrangement regarding the shifting and transferring of its freight in New York Harbor and the repair of its floating equipment were not, under the circumstances, detailed in the report in the interest of efficient and economical management as required by section 15a of the act."

In the course of its opinion in this case the Commission entered into the relative cost of the service, the labor of the contractors and the practice obtaining on other roads, and concluded that the amount paid by the Erie Railroad for the repair of its equipment was neither efficient nor economical management, as required by the Transportation Act.

128 I. C. C. 323-345.

In the case numbered 16,067, known as "Maintenance of Way Expenditures of Pittsburgh & Lake Erie Railroad Company," the Commission, on January 3, 1928, denied that the practice of the Pittsburgh & Lake Erie Railroad, in paying to labor contractors for their services in connection with the employment of maintenance of way laborers, an allowance of 10 per cent of the monthly earnings of its track and roadway laborers, including supervisory and camp and commissary employes, was not consistent with "efficient and economical management." The Commission went into the cost of labor paid by the contractors, and assumed full jurisdiction and power over the expenditures made by the respondent through its contractors to its maintenance of way laborers. The Commission, in the course of its opinion, said:

> "Our investigators show a net loss to respondent of $611,268.00. They applied railroad rates to the service hours performed on track and roadway by contract forces and compared the results with the total cost to respondent for contractor's services, exclusive of wages of track and roadway foremen and compensation insurance, which items respondent would have borne had it carried the men on its own roll."
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> * * * * * * *
>
> "Whatever may have been the justification for such an arrangement in the beginning under conditions which then existed, the facts of record do not justify its continuance."
>
> 136 I. C. C. 527-537.

This Court will take judicial notice of the fact that after the passage of the Transportation Act, the Interstate Commerce Commission, of its own initiative and pursuant to the jurisdiction vested in it by paragraph 21, instituted its proceeding No. 14,489 and issued an order therein as follows:

> **"In re Adequacy of Locomotives and Cars Owned by Common Carriers Used in the Transportation of Freight.**
>
> "The Commission, having under consideration the question of the **adequacy of the supply of locomotives and freight cars owned or used by each common carrier by railroad in continental United States, subject to the Interstate Commerce Act:**
>
> "It is ordered that the Commission, upon its own motion, and without complaint, enter upon a proceeding of investigation into and concerning the adequacy of the locomotives and cars of all descriptions owned and of the locomotives and cars used by each such common carrier by railroad and used in the transportation of freight between points in continental United States and into and concerning the customs and practices prevailing or desirable with respect to the ownership, use, and interchange of cars, with a view of promoting economical and efficient service, to prescribing and establishing such just and reasonable rules, regulations and practices with respect to car service, and to require the respondents to provide themselves with such safe and adequate locomotives and cars wherewith they perform as common carriers their car service as may upon such investigation appear to be contemplated and required by law.

"It is further ordered, that each common carrier by railroad, respondent herein, furnish the Commission the information called for in appendices "A" to "R", inclusive hereto, not later than February 1, 1923.

"It is further ordered that all carriers by railroad subject to the Interstate Commerce Act be and they are hereby made respondents to this proceeding; that a copy of this order be served upon each respondent; that the respective states be notified of this proceeding by sending copies of this order by registered mail to the Governor of each state, as well as to the tribunal thereof, if any, having regulatory powers over common carriers by railroad. * * *

"It is further ordered that this proceeding be assigned for hearing at such times and places as the Commission may hereafter direct."

It thus appears from this order of the Commission that the Commission has actually entered upon the duty of regulating the supply of cars, and seeing to it that the common carriers of the United States furnish an "economical, efficient" and a "safe and adequate car service" for the benefit of the public, and this in the face of the opinion of the three-judge court in this case that Congress has not vested the Commission with any jurisdiction or power to regulate the "practice" governing car service.

IX.

Railroad Labor Act.

Congress has also legislated completely upon the subject of railway labor, by providing for a Board of Media-

tion and an Emergency Board, if necessary, to determine all disputes and issues between railroad employes and the common carriers of this country.

44 Stat. 577, 578, 580, 582, 585 and 587.

The Railroad Labor Act provides that it shall be the duty of all carriers, their officers, agents and employes, to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and **working conditions**, and to settle all disputes. Conferences are provided for "in case of a dispute between a carrier and its employes arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, **rules or working conditions.**"

Congress, by the Railroad Labor Act, has given the Railroad Labor Board jurisdiction under certain conditions to determine any and all disputes submitted, and not only to prescribe reasonable rules, but to determine what are proper "working conditions" between railroad employes and common carriers.

If Congress, under the commerce clause of the Constitution, has delegated to the Railway Labor Board, when called upon, power over the subject matter of what are reasonable rules for the operation of railroads, and regarding agreements, and the working conditions of employes, then state authority ceases upon the subject matter.

In the recent case of

Texas & New Orleans R. Co. v. Railway Clerks
(281 U. S. 548)

Mr. Chief Justice Hughes, in summing up the comprehensive character of the Railway Labor Act of May 20, 1926 (44 Stat. 577), said:

> "It is unnecessary to review the history of the legislation enacted by Congress in relation to the settlement of railway labor disputes, as earlier efforts culminated in Title III of the Transportation Act, 1920 (c. 91, 41 Stat. 456, 469), the purpose and effect of which have been determined by this Court. In **Pennsylvania Railroad Company v. United States Railroad Labor Board**, 261 U. S. 72, the question was whether the members of the Railroad Labor Board as constituted under the provisions of the Transportation Act, 1920, had exceeded their powers. The Court held that the Board had jurisdiction to hear and decide a dispute over rules and working conditions upon the application of either side, when the parties had failed to agree and an adjustment board had not been organized.
>
> * * * * * * *
>
> "The bill was introduced as the result of prolonged conferences between representative committees of railroad presidents and of executives of railroad labor organizations, and embodied an agreement of a large majority of both. The provisions of Title III of the Transportation Act, 1920, and also the Act of July 15, 1913 (c. 6, 38 Stat. 103), which provided for mediation, conciliation and arbitration in controversies with railway employes, were repealed.
>
> "While adhering in the new statute to the policy of providing for the amicable adjustment of labor dis-

putes, and for voluntary submissions to arbitration as opposed to a system of compulsory arbitration, Congress buttressed this policy by creating certain definite legal obligations. The outstanding feature of the Act of 1926 is the provision for an enforceable award in arbitration proceedings. The arbitration is voluntary, but the award pursuant to the arbitration is conclusive upon the parties as to the merits and facts of the controversy submitted (Section 9).

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"Another definite object of the Act of 1926 is to provide, in case of a dispute between a carrier and its employes which has not been adjusted under the provisions of the act, for the more effectual protection of interstate commerce from interruption to such a degree as to deprive any section of the country of essential transportation service (Section 10).

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"It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employes, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings.

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"It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employes to make every reasonable effort to enter into and maintain agreements concerning **rates of pay, rules and working conditions**, and to settle disputes with all expedition in conference between

authorized representatives, but added this distinct prohibition against coercive measures. This addition cannot be treated as superfluous or insignificant, or as intended to be without effect (**Ex parte Public National Bank**, 278 U. S. 101, 104).

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"The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties.

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"We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement' (**The Daniel Ball**, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (**County of Mobile v. Kimball**, 102 U. S. 691, 696, 697); to 'foster, protect, control and restrain' (**Second Employers' Liability Cases**, 223 U. S. 1, 47). Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures."

When Congress, in 1920, specifically delegated to the Interstate Commerce Commission complete power to prescribe "safe and adequate" and to regulate "the supply of trains," and by the Labor Act of 1926 has thus definitely

empowered the United States Railroad Labor Board to fix and determine "rules and working conditions" in all the different branches of the service between common carriers by railroad and their employes, we submit that such state legislation as the Arkansas Extra Brakeman and Extra Switchman Laws are inconsistent with the exercise of this delegated power to these administrative branches of the Federal Government.

X.

Decisions of Supreme Court Upholding Arkansas Laws.

The decisions of the Supreme Court of the United States upholding the Arkansas Extra Brakeman and Extra Switchman Acts,

C. R. I. & P. Ry. Co. v. Arkansas, 219 U. S. 453;
St. L. I. M. & S. Ry. Co. v. Arkansas, 240 U. S 518,

were handed down, respectively, February 20, 1911, and April 3, 1916.

This was several years before the Transportation Act of 1920, which, the Supreme Court now holds, was intended to, and did, occupy the entire field of regulation of interstate carriers. No contention was made in the above cases that Congress had then acted upon the subject.

The definition of "Car Service" to include "and the supply of trains" was amended for the first time in the Transportation Act of 1920 (41 Stat. L. 476). The term

"Car Service," as it appeared in the Esch Car Service Act of May 29, 1917 (40 Stat. L. 101); did not include "the supply of trains," but only included "the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this act." In other words, the right of the Commission to regulate "the supply of trains" had not been included in the congressional legislation prior to the Transportation Act of 1920, and such power had not been conferred upon the Commission when the Arkansas Extra Brakeman and Extra Switchman Acts were before this Court and considered in the decisions upholding the legality of those statutes.

The provision of the Arkansas Extra Brakeman Law, that the law should not apply **"where said freight train, so operated, shall consist of less than twenty-five cars,"** in view of the modern improvements and methods of railroading, is so archaic and unreasonable that, upon this ground alone, in view of the provisions of the Transportation Act and the improvement in railroad practices and safety measures since those decisions were rendered, should clearly distinguish those decisions; but the Court, in those cases, has itself drawn the distinction between the conditions then existing and those now obtaining. Mr. Justice Harlan, in the **Rock Island** case (219 U. S. 453), uses the following language:

> "Under the evidence, there is admittedly some room for controversy as to whether the statute is, or was,

necessary; but it cannot be said that this was so unreasonable as to justify the Court in adjudging that it is merely an arbitrary exercise of power and not germane to the objects which, evidently, the State Legislature had in view. It is the means employed by the state to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts if they have a real relation to that object.

* * * * * * *

"Undoubtedly, Congress, in its discretion, may take charge of the whole subject of the equipment of interstate cars and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce; **but it has not done so in respect of the number of employes to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations upon that subject, and, until it does, the statutes of the states, not in their nature arbitrary, and which really relate to the rights and duties of all within its jurisdiction, must control**" (219 U. S. 466).

In other words, the very condition which was absent at the time that the above decision was rendered, i. e., the fact that Congress had not taken "**entire charge of the whole subject,**" does exist at the present time.

Congress has now legislated upon the whole field and delegated to one central body, outside the State of Arkansas, the regulation of "**the whole subject of the equipment of interstate cars,**" and, by doing so, according to the deci-

sion of Justice Harlan in the **Rock Island** case, the power of the state to legislate upon the same subject terminated.

If a given state, since the Transportation Act, can adopt regulations affecting freight trains transporting interstate commerce and containing over twenty-five cars, then it can impose such regulations upon trains containing five or ten cars, and this would be just as reasonable as the present regulation which affects trains of twenty-five cars.

According to the affidavits filed in this case, the average freight train in Arkansas and other states contains from fifty to seventy-five cars, and, with the modern power brakes and other appliances, any arbitrary conditions imposed upon trains containing only twenty-five cars or less are clearly unreasonable.

In the **Iron Mountain** case (240 U. S. 518), wherein the Supreme Court upheld the Arkansas Full Switching Crew Law, the Supreme Court, speaking through Mr. Justice McKenna, said, referring to the previous **Rock Island** case, upholding the validity of the Extra Brakeman Act:

> "In that case, as in this, there was controversy in the testimony and the contentions of the parties as to the necessity of the statute. It was held, however, that the controversy did not establish that the statute was an arbitrary exercise of power.
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> "A more serious objection is that certain terminal companies, one at the City of Helena and one at Fort Smith, do switching for certain connecting trunk lines,

and yet, by reason of their length being less than one hundred miles, are not covered by the act. Indeed, it is said that one of them, that at Fort Smith, does switching over some of the same crossings that plaintiff in error does. The distinction seems arbitrary, if we regard only its letter, but there may have been considerations which determined it, and the record does not show the contrary.

"We have recognized the impossibility of legislation being all-comprehensive, and that there may be practical groupings of objects which will, as a whole, fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant" (240 U. S. 521).

As said by Justice Harlan in the **Rock Island** case:

"Undoubtedly, Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars."

Since those decisions were rendered Congress has done so.

The subsequent action of Congress completely removes the reasons upon which these decisions are based. The supreme legislative power had not acted upon the subject upon which the subordinate legislative power had legislated when those decisions were rendered.

The height of oppression, which the rigor of the Arkansas statutes resulted in, was, no doubt, one reason which

prompted Congress to take over the subject matter and provide for the more reasonable rule which now obtains.

In any event, the condition confronting the Court, when these decisions were rendered, no longer obtains, and, exit the reason therefor, those decisions should not longer be held controlling upon the courts.

CONCLUSION.

In conclusion, the state laws complained of attain no useful or beneficial result; they constitute an unreasonable and unjust burden upon interstate commerce and a violation of the Fourteenth Amendment; are inconsistent with Sections 1, 13, 15 and 15a of the Act to Regulate Commerce, and with the general plan and objects of the Transportation Act of 1920, and the Railroad Labor Act of 1926, and the further enforcement of said Arkansas Extra Brakeman and Extra Switchman Laws should be restrained.

Respectfully submitted,

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